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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 1063

ALLEN E. NORTHERN, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-4) is reported at 329 F. 2d 794.

JURISDICTION

The judgment of the court of appeals was entered on March 27, 1964. (Pet. App. 1.) Mr. Justice Stewart granted an extension for filing the petition for a writ of certiorari until May 7, 1964, and it was filed on May 4, 1964. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1).

QUESTION PRESENTED

Whether, after the introduction of evidence that petitioner arranged to have records of his income falsified during the years covered by the indictment, the district court erred in admitting evidence that the arrangement was continued in subsequent years.

STATEMENT

Petitioner was indicted in three counts for willful attempted evasion of income taxes by filing fraudulent joint tax returns on behalf of himself and his wife for the calendar years 1954, 1955, and 1956, in violation of Section 7201 of the Internal Revenue Code of 1954. (R. 5a-7a.)[1] After a trial by jury he was acquitted on the first two counts but was found guilty on the third count (R. 465a), and sentenced to imprisonment for one year and fined $2,000. (R. 7a-8a). The third count alleged that petitioner had reported taxable income of $5,227.12 and a tax of $1,195.97, whereas the correct taxable income was $28,295.97 and the correct tax was $8,785.11. (R. 6a-7a.) The government's proof was by the net worth method (see R. 463a-464a), and the sufficiency of the evidence is not in dispute.

Petitioner owned coin-operated amusement machines at various restaurants and taverns. (R. 311a-312a, 330a.) Sometimes petitioner collected the money, but usually this was done by one of his em-

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[1] "R." refers to the Appendix and Supplemental Appendix filed by petitioner in the court of appeals. "Supp. R." refers to the Appendix for the government in the court of appeals.

ployees.* (R. 316a.) After certain expenses were defrayed, the balance of the moneys collected was divided equally between petitioner and the proprietor of the establishment, and a ticket was made out showing the amount thus divided. (R. 316a, 318a, 320a, 484a.) The government's evidence showed that receipts from numerous locations were not entered at all in petitioner's ledger during 1955 and 1956, and that in various other instances the ledger recorded smaller amounts than those actually received. (Supp. R. 64b-70b.)

Estes, the proprietor of one establishment, testified on direct examination that petitioner's employee, Green, who did the collecting from 1954 until he left petitioner in May 1956, recorded on the tickets only one-half of the true amount collected for the last seven or eight months of his employment. (R. 467a-469a, 485a.) Estes said that this was done by agreement between himself and petitioner. (R. 469a.) Estes discontinued the use of petitioner's machines at the time Green quit. (R. 342a, 485a.) On cross-examination petitioner's counsel, in an effort to show that petitioner knew nothing about this system of falsifying tickets, elicited answers in which Estes admitted that he could not remember exactly when or where the agreement with petitioner was made. (R. 470a-476a.)

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* Estes testified, however, that on occasion he himself took the money to petitioner and gave petitioner twice the amount of money shown on the ticket. (R. 472a.) Green also testified that he wrote the tickets concerning the Estes location in the manner Estes had described. (R. 483a-485a.)

Before commencing his redirect examination of Estes, the prosecutor offered to prove that Estes resumed the use of petitioner's machines in 1957 (the year immediately following the indictment years), that petitioner himself made the collections thereafter, that petitioner wrote out the tickets and understated the true amounts in substantially the same manner as Green had previously done, and that he did all this without any new conversation or agreement with Estes on the subject of falsifying tickets. (R. 476a-478a.) The prosecutor explained that petitioner's resumption of this peculiar practice, without a word between him and Estes on the subject, would tend to show that petitioner must have agreed to the method previously employed by Green. The court ruled that the evidence could be introduced for that limited purpose. (R. 478a-479a.) Accordingly, the jury returned to the court room and Estes testified as described above. (R. 479a-482a.) The court then immediately instructed the jury as follows (R. 482a):

> Ladies and Gentlemen of the Jury, during your absence we went into the question of the testimony that has just been heard by you here. The defendant objected to it as not pertaining to the case because it was after 1956. I overruled the objection and permitted these questions and answers to be placed in the record. However, you are instructed that the statements made by the witness with reference to what occurred in 1957, or subsequent years, can be considered by you only for such value as it may have, if any, in establishing the truth of the statements made

as to the agreements that were in existence in the years 1954, 1955 or 1956.

ARGUMENT

The testimony concerning petitioner's falsification of tickets in 1957 was relevant to the question whether petitioner and Estes had an agreement to falsify records during 1954, 1955 or 1956. The jury could infer that petitioner would not have resumed Green's practice of recording on the tickets only one-half of the money collected, without any discussion with Estes, unless the two of them had already had a prior agreement to that effect while Green was doing the collecting. In *Johnson* v. *United States*, 318 U.S. 189, 195-196, this Court held that it would be proper to show the taxpayer's receipt of payoffs from gamblers during 1938, a year not covered by the indictment, in order to establish that he had not, as he claimed, ceased such collections during the latter part of 1937. Evidence of subsequent conduct is, therefore, admissible in criminal income tax cases when relevant to the matter at issue. See also *Bateman* v. *United States*, 212 F. 2d 61, 66 (C.A. 9th); *United States* v. *Stoehr*, 196 F. 2d 276, 282-283 (C.A. 3d), certiorari denied, 344 U. S. 826.

Petitioner further argues (Pet. 5-6) that the evidence was inadmissible in that it established the commission of a separate offense not charged in the indictment. That contention has been answered in numerous cases. Relevant evidence does not become inadmissible simply because it may also prove the

commission of another offense. *Johnson* v. *United States*, *supra*, 318 U.S. at 195-196; *Cravens* v. *United States*, 62 F. 2d 261, 273 (C.A. 8th); *Lovely* v. *United States*, 169 F. 2d 386, 388 (C.A. 4th).

Finally, cases which hold (Pet. 6-8) that prior knowledge cannot be inferred from subsequent conduct are not in point here. As the petition itself concedes (p. 6), the issue here was not whether petitioner had knowledge in 1956 that he was acting illegally, but whether he and Estes actually did enter into an agreement in 1956 to falsify records. To that issue, his 1957 conduct was plainly relevant.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted.

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June, 1961.